Supreme Court, U. S.
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NO. 74-687

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

UNITED STATES OF AMERICA, *Petitioner*

v.

THOMAS W. MOORE, JR., Assignee for Benefit of Creditors of Emsco Screen and Pipe Company, and Emsco Screen and Pipe Company of Texas, Inc.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable Supreme Court of the United States:

Now comes Thomas W. Moore, Jr., Assignee for Benefit of Creditors of Emsco Screen Pipe Company of Texas, Inc., the Respondent herein, and files this Reply to the Petition for Writ of Certiorari.

PRELIMINARY STATEMENT

The Petitioner has accurately related the opinions below, the jurisdictional grounds, the question presented, and the statement of the case. In brief, this case involves the

Government's claim of priority to the proceeds of the insolvency of Emsco Screen Pipe Company of Texas, Inc. On October 20, 1966, the date of the insolvency, none of the Government's claims were liquidated as to amount.

REASONS FOR DENYING THE WRIT, AND ARGUMENT

The Court of Appeals below correctly held that claims unliquidated at the time of insolvency are not "debts due" within the meaning of the priority statutes.

This case involves the interpretation of the term "debts due" within the insolvency-priority statutes. The governing statute reads in relevant part as follows: "Whenever any person indebted to the United States is insolvent . . . the debts due to the United States shall be first satisfied." 31 U.S.C. § 191. The statute has been carried forward substantially unchanged in wording since its passage in 1797. Two Supreme Court cases have dealt with the matter indirectly, but the two cases are inconsistent. One of the Supreme Court cases suggests that an unliquidated claim is not included in the term "debt due". *Massachusetts, et al v. United States*, 333 U.S. 611, 68 S.Ct. 747, 755-757 (1948). The other Supreme Court case did not focus on the question of whether an unliquidated claim was a "debt due", but the Court assumed that priority applied, without discussion, even though the claim was liquidated. *King v. United States*, 379 U.S. 329 (1964).

A. "Debts Due", As Interpreted by Massachusetts v. United States, 331 U.S. 611 (1948).

In *Massachusetts*, an assignee for benefit of creditors paid state unemployment taxes rather than Federal in-

surance contribution taxes. The state argued that the assignee was entitled to do so because of provisions in the Federal law allowing credit for monies paid to approve state unemployment funds. The Court held that the right to pay the state taxes and take credit for them was cut off by the insolvency, which gave rise to the priority statute. It reasoned that the priority of the United States was absolute and was not conditional, once insolvency had arisen. The Court reasoned further that applying credits to the Federal tax for the state tax, as urged by the Commonwealth of Massachusetts, would take the priority statute beyond the term "debts due to the United States" because it would establish a contingency at the time of the insolvency. The language on which the Assignee relies in this case is as follows:

> "A further effect might be to make the statute applicable beyond the scope of the term 'debts due to the United States'. For if the taxpayer's subsequent election can destroy the priority retroactively, not only the priority but the 'debt' itself becomes contingent. *And it is at least doubtful on the statute's wording that obligations wholly contingent for ultimate maturity and obligation upon the happening of events after insolvency can be said to fall within the reach of 'debts due' as of the time of insolvency.*" (emphasis added) 68 S.Ct. at 756.

It is clear that the priority statute is detrimental to other creditors of the debtor. In the instant case, for example, 62 other creditors of Emsco will receive nothing on their claims if priority applies. Because of the harshness on other creditors, priority should only be accorded in the instances in which the statute clearly applies, such as in taxes and other liquidated debts.

The Assignee asserts that the term "debt due" does not include contingent, unliquidated damages. Numerous authorities indicate that the term "debt" in a legal sense, refers to a liquidated claim or a sum certain. See 26 C.J.S. "Debt", Page 5 and 6. *Massachusetts* itself pointed out in a footnote that in the long history of the statute that all the decisions sustaining the priority were for debts clearly due and owing and that Congress *"drew the line for its operation close to, if not at, the commonly accepted meaning of 'debt' as distinguished from other forms of obligation."* 68 S.Ct. at 756. A leading case interpreting the statute held that taxes were within the term "debt due". *Price v. United States*, 269 U.S. 492, 46 S.Ct. 180, 181 (1926). In its opinion, the Court gave strong support to the contention that "debts" mean liquidated claims by stating that "an action of *debt* lies to recover taxes where *the amount due is certain or readily may be made certain.*" 46 S.Ct. at 181. See also *Legett v. Southeastern Peoples College,* 68 S.E.2d 263, 267 (North Carolina, 1951) in which the court stated that "a debt due is a debt accrued, and a debt is accrued when all events have occurred which fix and determine the liability of the debtor to the creditor." In the instant case, the claims of the United States were unliquidated as of the time of the insolvency, and accordingly were not present debts within the contemplation of the statute.

Perhaps the most authoritative interpretation of the term "debt due" in the priority statute is found in an 1832 case by this Court in which the Court held that a bond in favor of the United States was a "debt" within the statute even though the maturity of the bond was after the insolvency. *United States v. The State Bank of North Carolina,* 6 Pet. 29 (1832). In the opinion, Justice Story

indicated that the term was used in a common sense and was to be interpreted in the sense of the common law maxim: *debitum in presenti, solvendum in futuro.* 6 Pet. at 39. Translated, the phrase means a present debt, payable in the future.

In the common law usage, the phrase refers to an ascertained sum of money that was certainly and in all events payable at some time in the future. Examples of this type of obligation would be promissory notes and bonds. The type of obligation would be a sum certain or readily made certain by mathematical computation. The common law usage of the term did not include obligations wholly contingent for ultimate maturity and obligation upon the happening of later events, as opposed to the mere passage of time. *See Baltimore City v. Rice,* 50 Md. 302, 316 (Md., 1879); *People v. Arguello,* 37 Cal. 524, 525 (Cal. 1969); *Bank of Pennsylvania v. Wise,* 3 Watts 394, 401-403 (Pa., 1834); *Wood v. Partridge,* 11 Mass. 488, 493 (Mass., 1814); *Davis et al. v. Samuel Ham et al.,* 3 Mass. 33, 37 (Mass., 1807); *Wentworth v. Whittemore,* 1 Mass. 471, 472-473 (Mass., 1805).

For example, in one of the foregoing authorities, the court held that the potential wages of a sailor were not subject to attachment in accordance with the statutory terms, because they were not really "debts" until the ship had landed, which was a later event, a contingency. *Wentworth v. Whittemore,* 1 Mass. 471, 472-473 (Mass., 1805). In the instant case, at the time of the Assignment for Benefit of Creditors, the damages owed by Emsco to the United States were wholly contingent for ultimate maturity upon the happening of later events and not the mere passage of time. There had to be a repurchase and re-letting of the contract to liquidate damages. As of the

date of the insolvency, it was possible there would be no damages or that Emsco would be excused from performance. One could not ascertain the prospective obligation by mathematical calculation, as in the case of a promissory note or a bond. There was no "debt" to which the United States was entitled to prior payment to the detriment of other creditors.

The majority and concurring opinions of the Court of Appeals properly looked to the common law for guidance in interpreting the term "debt due". Both opinions correctly focused on the question whether the amount of the obligation was certain or readily ascertainable at the time of insolvency. To that extent, the Court of Appeals decision is consistent with the interpretation of the term "debts due" by the Supreme Court in *Massachusetts* and *State Bank*. Certain language in the majority opinion below is too broad because it would require that the obligation be presently payable at the time of insolvency, but that unfortunate language should not detract from the court's proper insistence that a "debt" within the statute must be a liquidated claim, in the sense of a certain sum or a sum readily ascertainable by mathematical computation. The addition of the "mathematical computation" requirement allows the inclusion of debts payable after insolvency, such as promissory notes, bonds, etc. within the common law maximum, *debitum in presenti, solvendum in futuro,* in accordance with the *State Bank* decision.

From the foregoing authorities, it seems clear that the term "debts due", as used in the priority statutes and as interpreted by Justice Story in the *State Bank* decision, was used in the common law sense of liquidated damages. Had the legislature intended to include torts, unliquidated damages, or other types of obligations, it would have used

broader language such as "claims". It is a fair assumption that broader words were not used because of the harsh affecton other creditors of the insolvent.

B. Analysis of the Petition for Writ of Certiorari

The Government urges strongly that the priority statutes should be construed liberally to protect the Government's purse, particularly in bankruptcy cases. The Court should not, however, go beyond the plain meaning of the words "debts due" as intended by Congress. As indicated in the *State Bank* case, the statute ought to receive a fair and reasonable interpretation, in accordance with the just import of its terms. 6 Pet. at 33. The meaning of the term "debt", and the early cases heretofore cited, indicate thtat the framers of the legislation probably intended the term "debt due" as some type of liquidated, present debt. *Massachusetts v. United States,* supra, 68 S.Ct. at page 756; *The United States v. The State Bank of Carolina,* 6 Pet. 29, 39 (1832).

The argument of protecting the Government's purse has its strongest application in connection with tax revenues, which was one of the original purposes of the Act. *Price v. United States, supra,* 46 S.Ct. at 181. Taxes are "debts due" because they are reasonably liquidated claims; the amount due is certain or readily may be made certain. *Id.,* 46 S.Ct. at 181. Liquidation does not depend on events subsequent to the time in question, as in the instant case. Tax revenues are a revenue source that can be reasonably anticipated in the federal budget. In the instant case, the United States is not actually out any money because of the failure of Emsco because the contracts were relet at proper bids. It is doubtful that the fiscal policy of the United States depends to any sub-

stantial degree on damages gleaned from business failures of companies lacking business. While it is true that government claims on contract defaults may be affected by the instant case, the more significant Government tax claims should be relatively unaffected.

Claims involving contract defaults may result in prorata distribution to the Government instead of priority distributions, if the Government does not diligently liquidate its claims. Such a result is not unfair if one considers the significant adverse impact of the priority statutes on suppliers and other creditors of the insolvent, many of whom perhaps extended credit on the strength of the government contract. The instant case is an appropriate example of the consequences to other creditors. Emsco's other creditors, who were dealing with Emsco on a businesss basis, just as the United States was dealing with Emsco, will receive nothing on their claims if priority is granted to the Government.

It is important to distinguish between *recognition* of the Government's claims and *priority* of such claims. Certainly the Government's claims should be recognized in the instant case, though they were unliquidated at the time of the insolvency. Even wholly contingent are recognizable in bankruptcy. 11 U.S.C. §103 (a) (8) (9). But to say a claim is recognizable does not mean it necessarily should be entitled to a priority over other similarily recognizable claims. In State Bank, supra, Justice Story argued by analogy to decedents' estates that unmatured *debts* were entitled to priority because such *debts* were recognizable in the probate of estates. 6 Pet. at 37. The Government in its petition at page 9 has sought to extend that analogy by the citation of cases dealing with the recognition of unliquidated *claims*. The Government neglected the remaining portion of *State Bank* where Justice Story stated that the term "debts due" was to be understood by reference to the common law maxim, *debitum in presenti, solvendum in futuro,* which has been analyzed in the foregoing portions of this brief to indicate a definite, ascertained sum, payable in the future.

The limited cases in which unliquidated claims were held to be "debts due" are not binding on this case. In the case of *United States v. Barnes,* 31 Fed. 705, 707 (C.C.S.D.N.Y., 1887), the court cited no authority for its proposition that the priority statute applied to unliquidated claims, because there was none. In the case of *United States v. National Sur. Co.,* 254 U.S. 73 (1920), the opinion does not state whether the claim was liquidated or not at the date of insolvency, and there was no discussion of the issue. In the case of *United States v. King,* 379 U.S. 329 (1964), the claims were unliquidated at the time of insolvency, but the issue whether such claims were "debts" within the statute was not analyzed and apparently was not argued.

The government has attempted to minimize and distinguish the critical language found in *Massachusetts v. United States,* 333 U.S. 611, 626-627, 68 S.Ct. at 756 (1948). As noted previously, there, there Court stated that it was at least doubtful that obligations "wholly contingent for *ultimate maturity* and obligation upon the *happening of events after insolvency*" were "debts due" within the meaning and contemplation of the statute. 333 U.S. at 626-627, 68 S.Ct. at 756 (emphasis added). The Government argues at page 9 of its petition that *liability* in the instant case was not dependent on post-insolvency events. Surely such an argument does not equate the present case to that of a promissory note or a bond with a

post-insolvency maturity. Here ultimate maturity and obligation depended on more than the mere passage of time. It depended on reprocurring the contract to liquidate damages, a post-insolvency event or contingency that takes this case beyond the term "debt due", within the contemplation of the statute.

CONCLUSION AND PRAYER

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Service was posted on opposing counsel by certified mail this 13th day of January, 1975.

THOMAS OSA HARRIS